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# SLOT TRADING IN THE REFORM OF THE COUNCIL REGULATION (EEC) NO. 95/93: A COMPARATIVE ANALYSIS WITH THE UNITED STATES

DARIO MAFFEO\*

## SUMMARY:

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### 1. *Preliminary remarks*

The Council Regulation (EEC), dated January 18, 1993, n. 95/93 stating common rules regarding slot allocation in European Community airports, is closely linked to the liberalization of European Community air transport.<sup>1</sup>

**A**S IT CLEARLY seems from the “whereas” that introduce Regulation 95/93, it indeed appears that the “growing imbalance between the expansion of the air transport system in

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<sup>1</sup> To go into the disciplinary norms introduced in the so called third package more carefully, see P. Girardi, *La terza fase della liberalizzazione del trasporto aereo in Europa: contenuti e problemi applicativi*, DIR. DEI TRASP. 39 (1993); G. Rinaldi Baccelli, *La terza fase di liberalizzazione del trasporto aereo nella Comunità Economica Europea*, DIR. PRAT. AVIAZ. CIV. 2,237 (1991); G. Silingardi, *L'incidenza sul codice della navigazione della normativa comunitaria del trasporto aereo*, DIR. DEI TRASP. 343 (1997). To go into Regulation No. 95/93, please refer to P. Girardi & C. Colletta, *La nuova e attuale disciplina dell'assegnazione di bande orarie negli aeroporti comunitari. Normativa e sviluppi dell'applicazione del regolamento (CEE) n. 95/93 del Consiglio del 18 gennaio 1993*, in 43 TRASP. 64 (1994); P.G. Bellan, *L'assegnazione degli slot aeroportuali: problematiche giuridiche*, *L'Attività di trasporto aereo dopo la liberalizzazione del cabotaggio*, MILANO (1998); G. Silingardi & D. Maffeo, *Gli slots. Il caso Italia tra esperienza statunitense e comunitaria*, TURIN (1997).

Europe and the availability of adequate airport infrastructure to meet that demand (and consequently) . . . the increasing number of congested airports in the Community," is the nerve centre of the issue whilst being the most exposed within the liberalization process. As a matter of fact, the facilitation of the competition and encouragement to enter into the market . . . "require strong support for carriers who intend to start operations on intra-Community routes," aid that is realized through a technique of "allocation of slots at congested airports . . . based on neutral, transparent and non-discriminatory rules." Consequently a system for slot allocation is needed in order to "avoid situations where, owing to a lack of available slots, the benefit of liberalization is unevenly spread, and competition is distorted."<sup>2</sup> The Regulation 95/93 did not achieve the desired results.

The Members of the European Community were slow in applying the rules that were set down. Some points were not fully understood and consequently there have been several different interpretations. Thus, carriers have been treated differently in the various congested airports within the Community, even in the complex task of allocating slots.

Furthermore, not all of the co-ordinators acted independently; the rule concerning the withdrawal of slots was not applied correctly in every circumstance. There was a lack in transparency, and the rights of new carriers were not thoroughly guaranteed.

The growing difficulty in obtaining "good" slots in order to improve service made it increasingly difficult to get in and has therefore reduced competition while favouring the dominant carriers that are able to benefit from their "grandfather rights" for an unlimited period of time in the future. This distortion of the market has restricted the fulfilment of the positive effect of the liberalization.<sup>3</sup>

The European Commission, therefore, decided to ask the Coopers & Lybrand company to analyze how the Regulation 95/93 was applied and to propose changes. The Coopers & Lybrand report was published on October 17, 1995,<sup>4</sup> and it led

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<sup>2</sup> The first, eighth, second, twelfth whereas, respectively.

<sup>3</sup> See Silingardi & Maffeo, *supra* note 1, at 92.

<sup>4</sup> See Coopers & Lybrand Final Report, *The application and possible modification of Council Regulation 95/93 on Common Rules for the allocation of Slots at Community Airports*, Oct. 17, 1995 (1995 Final Report to the European Commission). See also Silingardi & Maffeo, *supra* note 1, at 96.

to a number of meetings between experts from the European Community member states and representatives of the sector.

However, in the last five years, the Commission has not yet reached a written proposal to improve the situation. This is probably due to the wide variety of opinions, particularly on the subject of the so-called "grandfather rights" and the trading of slots.

In the meantime, congestion in European skies has worsened dramatically.<sup>5</sup> Moreover, the growth in air traffic has by no means corresponded with the increase in airport capacity<sup>6</sup> and has generated a "hidden" market in the trading of slots. Because we are talking about a "hidden" market, it is difficult to estimate its exact size and economic value. Slots have indeed a high economic value in spite of the fact that they are not bought at first. Only once they have been allocated, according to the priority of the right gained, do they immediately gain value due to the fact that other carriers, who do not have enough slots or have slots at non-peak times, want to acquire them (the trade in such circumstances can be defined as "secondary trading").

The investigation carried out by Coopers & Lybrand revealed numerous sales of slots.

Other cases showed that major carriers bought smaller companies out in order to acquire their slots. For example, in 1997 British Airways took over British Caledonian to have its slots at London Gatwick.

Another interesting aspect of this trade is the case of renting a branch of a company set down and agreed upon in 1996 between the carriers Noman and Air One. This allowed the latter to use fourteen slots of the former at Linate Airport.<sup>7</sup>

In May 2000, a couple of slots at Gatwick Airport belonging to AB Airlines were sold to Virgin Atlantic, seemingly for the sum

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<sup>5</sup> A recent study evaluates the economic consequences of air traffic congestion in Europe as resulting in 1.4 billion American dollars in 1994 and possibly reaching 6 billion American dollars in the year 2000. The traffic lost due to traffic congestion is estimated at about 27 million passengers in the year 2000. British Airways estimated that congestion linked to the ATC problem causes them to consume 50,000 tons of extra fuel each year.

<sup>6</sup> According to the AEA, over 90% of European Airports used by more than five million passengers a year will meet serious problems on the runway and the apron before the year 2005, while sixteen major airports will experience saturation problems from the year 2001 onward.

<sup>7</sup> See Silingardi & Maffeo, *supra* note 1, at 35, 89.

of two million British Pounds. A recent estimated value of slots at London Heathrow Airport is over one billion British Pounds.<sup>8</sup>

To put an end to this "hidden" market and guarantee more transparency on the matter regarding the allocation of slots, the European Commissioner of Transport, Loyola de Palacio, has decided to propose a thorough revision of the Regulation 95/93 so as to include a norm that allows for the sale of slots.<sup>9</sup>

Before looking closer at this proposed revision, it is appropriate to look at what has happened in the United States, where a norm on the trading of slots has been in force since 1985.<sup>10</sup> This look allows us to have an interesting comparison and to see whether the legalization of slots trading favours the establishment of a truly competitive market eliminating the dominant position of certain major carriers that have advantages over new entrants in the market, and at the same time, guarantees that consumer-users are able to take advantage of better flight offers and more competitive prices.<sup>11</sup>

## 2. *The United States of America*

### 2.1. *The high-density rule.*

In 1968, several American airports, with their relative air space, were close to saturation. The most congested areas being Chicago, New York, and Washington. In particular, flights for New York were normally delayed and occasionally cancelled, due to intense traffic. In the summer of 1968, delays increased by 30% compared to the previous year. The situation had become unacceptable for all concerned: the carriers, the passengers, and the Federal Government.<sup>12</sup> Consequently, the Federal Aviation Administration (FAA), proposed a specific norm to be applied at airports designated as high-density risk areas. The attention of FAA was focused on several airports: John F. Kennedy (JFK), La Guardia (LGA), Newark (EWA), Chicago O'Hare

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<sup>8</sup> See John Balfour, *Who really owns the slots? A legal view*, Presentation at the London Strategy For Overcoming Slots Limitation Congress (June 27, 2000).

<sup>9</sup> No. 7765 BULLETIN QUOTIDIEN EUROPE, July 26, 2000, at 6.

<sup>10</sup> The chapter on the United States of America is an integration and updating of the chapter 3.1 quoted volume. See Silingardi & Maffeo, *supra* note 1 at 47.

<sup>11</sup> See C. Pozzi, *Il ritiro dello slot e della serie di slot nel reg. (CEE) n. 95/93*, DIR. DEI TRASP. 485 (1999).

<sup>12</sup> *Report to Congress: A Study of the High Density Rule: Technical Supplement No. 2 and Trend Analysis*, U.S. Department of Transportation, May 1995, at 22 (hereinafter *Study of the High Density Rule*).

(ORD), and Washington National (DCA).<sup>13</sup> The FAA indicated, however, that if congestion and delay increased in other areas, it would consider an extension to those areas of these air traffic rules. These rules proposed to limit the number of Instrument Flight Rule (IFR)<sup>14</sup> operations (takeoff and landings) permitted per hour and to require that a "slot" support each operation. The FAA proposed to allocate the hourly IFR reservation or "slots" among three classes of users: air carriers, commuters, and all other aircraft operators.<sup>15</sup> In December 1968, the FAA adopted the high-density rule.<sup>16</sup> In the preamble to the rule, the FAA specified that the rule should not be considered as the permanent solution to the air congestion issue, and that in time, it would be reviewed and modified as circumstances suggested.

In February 1969, the FAA amended the rule, stating its temporariness and establishing that it would expire on December 31, 1969.<sup>17</sup> The FAA was forced to extend the expiration date, even before it arrived, as conditions had remained unaltered. In 1973, the FAA stated that it would uphold the high-density norms for an indefinite period of time at O'Hare, J.F. Kennedy, La Guardia, and Washington National airports.

Although the high-density rule stated how to determine the maximum number of IFR operations at each concerned airport and how to allocate the number of slots among the different types of operators, it did not contain a provision allocating the slots among the operators within each class.<sup>18</sup>

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<sup>13</sup> When the high-density rule was proposed, the DCA had been subject to operating restrictions for the last two years. In fact, in 1966, carriers that used DCA airport had reached an agreement, following an FAA request, to limit their operations (takeoff and landings) voluntarily to no more than forty per hour.

<sup>14</sup> The Federal Aviation Regulations (FARs) require IFR operations when weather conditions are below the minimum for flights under visual flight rules (VFR). In establishing the number of IFR movements, the FAA stated that it would take into consideration ground facilities, weather conditions, noise abatement procedures, aircraft mix, the uniformity of flow, runway combinations and the availability of alternative airports, in each case.

<sup>15</sup> For purposes of this article, "air carriers" mean carriers that use jets with over fifty-six seats and turbojets with over seventy-five seats; "commuters" mean carriers that use jets with less than fifty-six seats and turbojets with less than seventy-five seats; "other" means general aviation and charters.

<sup>16</sup> An FAA final rule designated JFK, LGA, EWR, ORD and DCA as high-density airports. The rule was to become effective on April 27, 1969. See High Density Rule, 33 Fed. Reg. 17,896 (1968) (codified on Apr. 27, 1969 at 14 C.F.R. pt. 93).

<sup>17</sup> See Eileen M. Gleimer, *Slot Regulation at High Density Airports: How Did We Get Here and Where Are We Going?*, 61 J. AIR L. & COM. 877 (1996).

<sup>18</sup> See *id.* at 880.

In fact, the FAA expressly contemplated that the airlines would voluntarily reach decisions to reduce their schedules to the level required by the high-density rule and noted that the airlines were already discussing schedule changes pursuant to authority granted by the Federal Government.<sup>19</sup>

In fact, the carriers arrived at agreements through Scheduling Committees, which were approved by the Civil Aeronautics Board (CAB), and these agreements allowed them immunity from the antitrust laws.<sup>20</sup>

The Airline Deregulation Act of 1978 caused this system to fail when new carriers attempting to break into the market lowered prices considerably and offered new flight connections.

At first, the influx of these new carriers did not cause great problems at airports subject to high-density rules, as the number of slots requested was not so high as to affect the agreements that had already been reached and established by the Scheduling Committees. However, in the winter of 1980, the system came to a halt for the first time when the New York Air Company announced that it wanted to start a shuttle service between Washington and New York. In order to do this, New York Air asked for slots at both Washington National and La Guardia airports.

The dead end came to a head within the Washington National Airport Scheduling Committee, when New York Air asked for twenty slots to be spread out at all peak hour times and was faced with opposition from the other carriers that had no intention of giving up their flight schedules.

Having understood that a voluntary system for the carriers to reach any agreement was now impossible, the FAA decided to intervene by allowing New York Air to operate on eighteen of the twenty slots originally requested. Some of these slots were taken from carriers that readily gave them up while the others were taken away from twelve of the most important carriers and members of the Scheduling Committee.

The legitimacy of the FAA action was contested by some of the carriers, but the appeals court<sup>21</sup> confirmed the action by stating that the intervention taken was thoroughly legitimate, apt in

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<sup>19</sup> In 1968, the Civil Aeronautics Board (CAB) allowed carriers operating at Chicago, Los Angeles, New York, and Washington airports to voluntarily arrive at decisions to change their schedules.

<sup>20</sup> See 14 C.F.R. pt. 93 (K), (S).

<sup>21</sup> See *Northwest Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309, 1318 (8th Cir. 1981).

its procedure, and with a rational basis. The court went on to say that the action taken was fully coherent with the competition policy set down in the Airline Deregulation Act. The combined effect of the liberalization process and the strong intervention of the FAA put the former agreement between carriers that had been valid until that moment, into question.

The FAA therefore decided to adopt a new system for allocating slots based partly on its own direct intervention; partly on an auctioning system and partly on decisions taken by the Scheduling Committees. However, this proposal failed to be applied due to industrial action taken by the air traffic controllers in 1981.

In order to face the air traffic paralysis caused by this strike, the FAA substituted the high-density rules with the National Air Traffic Control Contingency Plan. This later became known as the Interim Operation Plan, and through this, it was possible to enforce restrictions at twenty-two of the busiest airports, thus reducing the carriers' scheduled operations by twenty percent.

Furthermore, the FAA introduced a Slot Exchange Agreement, which allowed slots to be bought, sold, and exchanged between carriers for an experimental period of forty-two days. All transactions had to be approved by the FAA. During this period, 248 slots were traded with a market price that varied from \$12,000 to \$500,000 per slot.<sup>22</sup> For the government and the carriers, the possibility to trade slots was a new experience. And for the first time, an economic value was applied to the slots. In order to optimize the use of air space, the FAA introduced a rule known as "Use-or-Lose" that stated that all slots acquired must be used for a minimum of seventy percent of the time, otherwise they would be confiscated. Finally, the FAA introduced a kind of sweepstake system to attribute slots to new carriers.

In August 1984, the restrictions set down by the Interim Operation Plan were abolished and the high-density rules were again applied. In spite of all this, there was still highly congested air space and outstanding delays during peak hours at major airports. It became more and more obvious that the system of reaching agreement on a voluntary basis was not suitable in a deregulation context.

The practical obstacles faced by the Scheduling Committees (for example those concerning unanimity), together with the

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<sup>22</sup> See *Study of the High Density Rule*, *supra* note 12, at 26.



basic concept of deregulation—that the market itself can guarantee an environment for a better and more competitive organization in assigning slots—led the FAA, the industry, and Congress to consider the introduction of rules on the trading of slots to be added to the high-density rule.

## 2.2 *Rules on slot trading*

The FAA adopted The Buy-Sell Rule in December 1985, which allows air carriers and commuters to sell slots in four high-density airports.

The first slot allocation was based on the so-called “grandfather clause,” as air carriers and commuters were considered to be the recognized holders of slots that they had already acquired up until December 16, 1985.<sup>23</sup> The smaller carriers with fewer slots contested this rule of slot allocation, pointing out that the larger companies had arbitrary economic and practical advantages over them. The transportation department responded to this criticism by stating that such initial benefits were necessary in order to establish a buy-sell system and at the same time, minimize any difficulties that could affect service. In addition, the transportation department claimed that the “grandfather clause” was in effect a recognition of the investment and commitment that these carriers had made in the past concerning personnel, equipment, communication networks, and planning.

The most important provisions set down in the trading rule are the following:

Slots are allocated according to three types of users: carriers, commuters and others;

The FAA has the right to create, eliminate or withdraw slots for any reason unless they are allocated to essential services (EAS)<sup>24</sup> or international services. In the case of the EAS slots,

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<sup>23</sup> See *id.* at 65.

<sup>24</sup> In the Airline Deregulation Act (ADA), a measure was introduced, even though it had transitory effect, that changed one of the main principles of freedom of air traffic movement for the worse (i.e., the possibility for carriers to reduce, suspend or interrupt a flight service definitively according to the company's economical status). This measure was done to favor and guarantee “essential” air links with “smaller American communities.” The general fear that free access to the transport market would cause carriers to forsake air links considered to be less profitable, forced the American lawmakers to adopt measures that favoured “local services.” This is the case in Art. 419 of the ADA, that guarantees the classification “essential” for services that cover links to and from “small communities” that are considered to be “eligible” with aid of a federal grant, for a

they can only be withdrawn by the Transport Secretary, if deemed necessary, whereas in the case of international slots they can only be withdrawn if they are not used for a period of more than two weeks;

Slots can also be bought by non-carriers;<sup>25</sup>

All permanent slots,<sup>26</sup> except for those covering international services or EAS, can be bought, sold, exchanged or leased out, rented on a daily, weekly or monthly or undetermined period of time basis, by anyone, with no limit in quantity, at any high density airport;

Slots have to be used for 80 percent of the time within two months; otherwise the FAA can withdraw them;<sup>27</sup>

Slots voluntarily returned by air carriers or commuters, slots withdrawn by the FAA under the use or lose provision, and new slots can be put on offer through a lottery.<sup>28</sup>

### 2.3 Nature of the slot market

The slot market has the following basic characteristics:

Slots are not goods in that the seller cannot produce them. Slots have a value because they facilitate air travel to and from high-density airports. They do not have an intrinsic value on their own.<sup>29</sup> Furthermore, in contrast with industry where the

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period of 10 years. See 49 U.S.C. § 1389 (2000). This article also restricts the carriers in suspending or abandoning links with the "small communities" unless they are temporary and in line with the provision of the essential services (EAS). *Id.*; see G. Silingardi, *Gli oneri di pubblico servizio nel trasporto aereo comunitario*, DIR. DEI TRASP. 45 (2000); *Il completamento delle misure di liberalizzazione del trasporto aereo*, RIV. GIUR. CIRC. 512 (1997).

<sup>25</sup> This provision has special importance both in local communities that buy slots to guarantee that the local airport is connected to at least one of the high-density airports and to those carriers that intend to use the slots they have acquired as guarantee for loans. For example, the Shawmut Bank holds slots belonging to TWA; the State Street & Trust Company holds slots belonging to Business Express; and the City Bank holds slots belonging to USAir Shuttle.

<sup>26</sup> For the FAA, a slot is not considered to be permanent if it is allocated for a brief period of time and has to go back to its Scheduling Committee. High Density Traffic Airports; Slot Allocation and Transfer Methods, 50 Fed. Reg. 52,180, 52,183 (final rule proposed Dec. 20, 1985).

<sup>27</sup> The aim of this provision is to stop companies from detaining clusters of slots for speculative reasons and so favor an optimal use of airport capacity. *Id.* In reality, as it will be noted later, this goal is systematically eluded as carriers rent their slots out to other companies or use them, even at a loss, during weekends so as to avoid going under the minimum level of use established.

<sup>28</sup> The last lottery took place in 1989, and it seems that the FAA does not intend to proceed with further extractions.

<sup>29</sup> See *Study of the High Density Rule*, *supra* note 12, at 68.

sellers produce the goods, slots can only be created by a third party, the Federal Government, that does not make up any part of the market, neither as a buyer nor as a seller.

Slots are not subject to property rights. The FAA stated that "[s]lots do not represent a property right but represent an operating privilege subject to absolute FAA control."<sup>30</sup> The court held that slots are not property themselves and that even if a limited proprietary interest arose from the allocation of slots, transfer, or disposition of such slots would nevertheless require FAA approval.<sup>31</sup> On the other hand, the bankruptcy courts queried this principle.<sup>32</sup> In the case of the McClain Airlines bankruptcy, the court stated that slots are property of the estate of the debtor airline, which has been granted slots, despite the Federal Aviation Act, which prohibited the CAB from creating property rights in air transportation. Notwithstanding the FAA's disclaimer of "property rights" in slots, the court held that such a position must be assessed according to current administrative developments (that is, the buy-sell rule that permits carriers to purchase or sell slots). The court also noted that the enactment of rules to minimize "the need for government intervention . . ." and the provision of "maximum reliance on market forces to determine slot distribution . . ." was difficult to reconcile with the FAA's claim that such free market items do not constitute property rights.<sup>33</sup> On other occasions, the Court had taken decisions by referring to a former *McClain* case, stating that the position of the FAA, which sustained that slots do not represent any property right is invalid as they do detract from the reality that a market for these slots exists and that carriers possess a proprietary right in allocated slots even if that is burdened by conditions imposed by FAA regulations. By applying this concept, the court determined that any proprietary interest held by the airline in the slots terminated automatically when the airline failed to use the slots for the requisite period of time and that the withdrawal of the slots by the FAA did not violate the automatic stay contained in the Bankruptcy Code.<sup>34</sup> This judgment, put forward by the Bankruptcy Court, forced the FAA to recognize

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<sup>30</sup> 14 C.F.R. pt. 93.223(a) (2000). See also Prof. Haanappel, *Airport Slots and Market Access: Some Basic Notions and Solutions*, AIR & SPACE LAW 202 (1993).

<sup>31</sup> See *In re Braniff Airways, Inc. v. Braniff Airways, Inc.*, 700 F.2d 935, 942 (5th Cir. 1983).

<sup>32</sup> Gleimer, *supra* note 17, at 891 n.62, 63.

<sup>33</sup> *In re McClain Airlines, Inc.*, 80 B.R. 175, 179 (Bankr. D. Ariz. 1987).

<sup>34</sup> See *In re Gull Air, Inc.*, 890 F.2d 1255, 1259-60 (1st Cir. 1989).

slots for what they are and in the light of the buy-sell rule they are in fact rights of property that have to be defended in case of bankruptcy.<sup>35</sup>

Not all slots can be bought and sold. Only national slots and those classed as air carriers and commuter slots can be put on the market.

Other slots have no market value. In contrast to slots that allow a certain party to land or takeoff at an airport in a certain time and day of the week, those in the "other" category are slots held by the FAA and allocated for use of the general aviation bodies or other users during IFR conditions. These latter slots cannot be detained, exchanged, bought, sold, or rented out.

#### 2.4 *The value of slots*

The market value of slots is not homogeneous: slots that allow aircraft of all sizes like those that permit aircraft to fly at peak times are obviously worth more. United Airlines pointed out that peak hour slots at O'Hare airport were sold for over two million American dollars. Such a high price is not surprising considering that every United Airlines slot at this airport generates a turnover to the value of five million American dollars per year. An additional advantage is that acquisition of slots keeps competitors at bay.

The market value of a slot is therefore determined according to the airport, the time allocated, the season, the category of operators able to use it (air carriers or commuters), and other factors linked to availability of gates. Other elements that influence the price of a slot are operative limitation. For example, Washington National is one of the busiest high-density airports with severe noise abatement procedures and major operative runway limitations, all of which make the slots at this airport particularly high in value.

The cost of slots in airports that are subjected to the high-density rule could prohibit new carriers from entering into competition, although it should be noted that in reality, the major air companies would avoid selling slots, whatever the price.<sup>36</sup>

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<sup>35</sup> The FAA claimed that the principle of slots as property upheld by the Bankruptcy Courts "[has] not been found in any other context." *In re United Airlines, Inc.*, No. 27151, B.R. (May 3, 1993).

<sup>36</sup> See *Airport Mobilization: Barriers to Entry & Impediments to Competition, Hearings on the State of Competition in the Airline Industry Before the House Committee on the Judiciary*, Cong. 67-330 (2000), available at <http://www.house.gov/judiciary/demp0614.htm> [hereinafter *Hearings*] (testimony of Paul Stephen Dempsey).

In the following, we will show how some of the most significant transactions occurred in recent years: In 1990, United Airlines paid 60 million American dollars for twenty-one slots and the use of gates at O'Hare airport. In the same year, American Airlines bought fourteen slots at La Guardia and Washington National airport. On that occasion it was said that slots at such busy airports were generally sold for a value that ranged between 500,000 and 1 million American dollars per slot, the price being determined according to its time and its takeoff and landing rights.<sup>37</sup>

In 1991, USAir bought ten slots at Washington National and twelve slots at La Guardia for 16.8 million American dollars (that is \$760,000 per slot). USAir also bought eight slots at La Guardia airport for 6 million American dollars (that is \$750,000 per slot). American Airlines bought twelve slots at La Guardia airport and ten slots at Washington National for 21.4 million American dollars (that is \$970,000 per slot). Continental bought thirty-five slots at La Guardia airport taking on a debt worth 54 million American dollars from Eastern Airlines (that is \$1.5 million paid per slot). Delta bought six slots at La Guardia airport for 3.5 million American dollars (that is \$585,000 paid per slot).<sup>38</sup> In 1996, it is said that a new entrant on the market was forced to pay approximately 2 million American dollars for a single slot at La Guardia airport.<sup>39</sup>

### 2.5 *The trading of slots and competition. The Authorization Act of 1994.*

While opportunities to introduce rules dealing with the trading of slots were being discussed, the opposition of such new legislative moves put forward the following objections:<sup>40</sup>

- (1) It would give an undeserved "windfall" to incumbents;
- (2) It would increase air fares;
- (3) It could cause slots used for service to small communities to be outbid by carriers seeking to serve more lucrative routes; and
- (4) It would create anticompetitive incentives for large carriers to outbid smaller carriers for slots.<sup>41</sup>

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<sup>37</sup> See *id.* at 11.

<sup>38</sup> See *id.*

<sup>39</sup> See *id.*

<sup>40</sup> See *id.* at 9.

<sup>41</sup> *Hearings, supra* note 36, at 9.

The past shows that many of the objections presented had sound bases. However, they contrasted with the position taken by the Department of Transportation that maintained that the larger airline companies would not use their resources and the flexibility created by the buy-sell rules to control the market and create dominant positions at high-density airports.

"Reality has shown that the Department of Transportation's beliefs were quite naïve."<sup>42</sup>

A study carried out by the Department of Transportation has shown that sales between unrelated carriers have decreased from 110 per quarter in 1986 to 28 per quarter in 1987 to 12 per quarter in 1988.<sup>43</sup>

In order to work more effectively, the market needs to have a certain number of sellers and buyers. The slot market, on the other hand, has an excess of buyers and very few sellers. Those who have slots tend to protect and keep their share of the market in order to avoid favouring any potential competitors. It is sufficient to note that the main American airline companies have control of 91% of the slots at Washington National Airport, and the rest are almost all controlled by commuter companies that are also their affiliate companies.<sup>44</sup>

The buy-sell rule caused an increase in the price of slots, as forecast by those that opposed it in the first place. The General Accounting Office (GAO) found that airports, where entry is limited by slot control, have about seven percent higher airfares.<sup>45</sup> For example, the average prices at La Guardia airport are thirty-five percent higher than those at thirty-three other airports.<sup>46</sup> In order to resolve this situation in 1993, the Baliles Commission pointed out to the FAA the need to "review the rule that limits operations at high density airports with the aim of either removing these artificial limits . . . ."<sup>47</sup>

Consequently, with the 1994 Authorization Act, the FAA authorized the Department of Transportation to allow slot exemptions and to permit new entrants<sup>48</sup> to provide services at high-density airports (with the exception of the Washington airport).

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<sup>42</sup> See Gleimer, *supra* note 17, at 896 n.88.

<sup>43</sup> See *id.* at 910, n.141.

<sup>44</sup> See *Hearings*, *supra* note 36, at 10.

<sup>45</sup> See *id.* at 12.

<sup>46</sup> *Id.*

<sup>47</sup> See *id.* at 14 (citations omitted).

<sup>48</sup> A 'new entrant' is a carrier or commuter that holds and operates (or held and operated from December 16, 1985, onwards) less than twelve slots at the

The Authorization Act states that the Department of Transportation can allow slot exemptions whenever public interest is involved and exceptional circumstances require it.<sup>49</sup>

Up until the late 1990s, the Department of Transportation did not recognize the so-called "exceptional circumstances" when an incumbent carrier is already running a non-stop service on a route that is then requested by the new entrant.<sup>50</sup>

In fact, up until 1996, the Department of Transportation accepted very few requests for exemption and only whenever a new entrant wanted to run a service on a route that was not already covered did it allow non-stop links.<sup>51</sup>

The U.S. GAO seriously criticized this narrow interpretation of the "exceptional circumstances" doctrine.

In its October 1996 report to Congress, (*Airline Deregulation: Barriers to Entry Continue in Several Key Domestic Markets*), the GAO found that "control of slots by a few airlines greatly deters entry at key airports in Chicago, New York and Washington."

The GAO also found

few new entries have occurred (at slot-constrained airports) because the DOT has interpreted the 'exceptional circumstances' criterion narrowly and has rejected applications to provide service in those markets already receiving non-stop service . . . . In our review of the legislative history, however, we found no congressional guidance on the interpretation of the "exceptional circumstance" criterion. Moreover, by selecting a very narrow interpretation, DOT has discouraged entry, according to senior management at many airlines that started after deregulation. They told us that DOT's narrow interpretation of the exceptional circumstance discouraged them from applying for slots. Many

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airport in question, not including the international slots, EAS or certain night slots at La Guardia and Washington airports. See 49 U.S.C. § 41714 (h)(3) (1994).

<sup>49</sup> See 49 U.S.C. § 41714 (c) (1).

<sup>50</sup> See *Hearings*, *supra* note 36, at 15.

<sup>51</sup> In September 1994, the Department of Transportation allowed an exemption to Reno Air permitting them to run three flights to end from Reno and O'Hare airports - a link where no other non-stop service already existed. See *In Re Reno Air, Inc.*, D.O.T. Order 94-9-30 (Sept. 20, 1994). The exemption stipulated the exact times when the carriers had to take off and land and that the service be carried out only by stage 3 aircraft. *Id.* The order also made it clear that Reno Air had only been granted a temporary authorization and did not own or hold the slots. This limited their power to sell, trade, exchange or give up slots. Despite all this, Reno Air was also subject to the "use-or-lose" rule, which is usually applied to holders and owners of slots at high-density airports.

noted, for example that they would not “waste the time” applying to DOT for slots in markets where an incumbent carrier already provided non-stop service. They also suggested that competition could be substantially increased in some markets if Congress revised the exemption criteria so that applications resulting in substantial competitive benefits are allowed.<sup>52</sup>

In response to statements made by GAO, the Department of Transportation announced that it would interpret the “exceptional circumstance” criterion “in a less restrictive way in order to encourage competition.” Henceforth, the DOT would find “exceptional circumstances” to exist warranting an exemption from the High-Density Rule based on the following: (1) applicants would fly jet aircraft that meet Stage 3 noise requirements in the market; (2) there is a reasonable expectation that the proposed service would be operationally and financially viable; and (3) the applicant either (a) will offer new non-stop service where none now exists, or (b) has demonstrated potential to offer low-fare competition, there is a single carrier service and the market could support competition, or the existing carriers do not provide meaningful competition.

The first decision showing this new interpretation of the rule had been applied concerned a request by Frontier Airlines. The Department of Transportation recognized the need to introduce a new service and create competition with an incumbent service and more specifically a low cost service. The DOT judged that “substantial benefits can be achieved through increasing competition at slot-constrained airports in situations where consumer would be able to obtain significantly lower fares in non-competitive or underserved markets.”<sup>53</sup>

DOT also experimented with a program of allocating slot exemptions to selected communities in order to assist them in securing service to slot-constrained airports.

Major carriers alleged that the real reason for the new entrants’ applications for exemptions is that they wanted to avoid the expense of purchasing or leasing slots at a slot-constrained airport and thereby, sought again a competitive advantage by avoiding the normal cost of doing business.

An objection was made; pointing out that the large airline companies had obtained slots at high-density airports without paying any cost or without renting. Furthermore, as aforemen-

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<sup>52</sup> *Hearings*, *supra* note 36, at 15.

<sup>53</sup> *Id.* at 18.



tioned, it is common practice to rent out slots to other companies just to keep hold of them and in this way, block any new entrants to the market.<sup>54</sup>

The 1994 Act also required DOT to conduct a study of the High-Density Rule and report back to Congress. A year later, the DOT carried out a study and completed a report.

The report revealed that the high-density rule had often created artful timetable limits on operations and had consequently reduced movement. On repeal of this rule, there would be an increase in capacity, especially at Washington National and O'Hare airports. As far as Kennedy airport is concerned, the capacity of the runways matches the number of slots allocated, whilst other flight infrastructures could allow for an increase in traffic. At La Guardia airport, on the other hand, the number of slots allocated exceeds the capacity of the runways.

The DOT therefore found that the banning of the rule, or even a substantial modification of it, would bring an increase of the number of movements: an increase that would cause both benefits and cost reductions. For example, users could benefit from new and extended airline services and low cost fares. Airports would also benefit from a rise in income due to the increase in movements. Vice versa, the incumbent carriers would face loss in profits due to the increase in competition.

At the same time, there would be a high concentration of flights at peak-hours, which would cause sound pollution and delays.

By analyzing costs and benefits, that is, subtracting the additional costs caused by delays from the increase in income and taking into account the new passengers using the airport following the elimination of the High-Density Rule, the Department of Transportation worked out that O'Hare airport could earn a net profit to the value of \$205 million per year and Kennedy airport could earn \$57 million per year.

La Guardia and Washington airports, on the other hand, would have losses on the banning of the High-Density Rule, according to the Department of Transportation calculations.<sup>55</sup>

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<sup>54</sup> *Id.* at 19 (showing how paradoxical the large companies are by strongly protesting against the exemptions permitted on the domestic market, while being the first in line to request exemptions at foreign airports such as London Heathrow and Tokyo Narita).

<sup>55</sup> Gleimer, *supra* note 17, at 924.

The Department of Transportation, therefore, found that the revocation of the High-Density Rule would directly affect the intrinsic value of the slots because their prices are established by the access limits set at high-density airports.

The reduction in value would cause downfall in the selling market. This reduction in value of the slots would consequently put a stop to the practice of using slots as guarantees; depriving the airline companies of an important financial resource and also creating substantial problems to banks that had accepted slots as a form of guarantee.

## 2.6 *The "Perimeter Rules"*

At Washington National and La Guardia airports, the "perimeter rules" have been applied, bringing with them strong anti-competition effects.

In the 1960s, the Civil Aeronautics Board originally fixed the distance limit between the airport of origin or destination and Washington National airport at 600 miles. The Department of Transportation later extended this limit to a 1,000-mile radius in 1981 and further extended it to 1,250 miles, with the approval of the Congress of the Washington Metropolitan Airport Act, in 1986.

This restriction was criticized in a study on American Aeronautic Industry Competition, carried out by the Transportation Research Board, in 1999:

These rules no longer serve their original purpose and have produced so many adverse side effects, including barriers to competition. These rules arbitrarily prevent some airlines from extending their networks to these airports; they discourage competition among the airports in the region and among the airlines that use these airports; they are subject to chronic attempts by special interest groups to obtain exemptions.<sup>56</sup>

## 2.7. *Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century*

The Airline Deregulation Act of 1978 aimed to eliminate all restrictions for entering the air transport market. However, as we have already seen, the slot rules and, to a certain extent, the perimeter rules, continue to represent strong barriers against true competitiveness.

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<sup>56</sup> *Hearings, supra* note 36, at 25.

Not even the widest interpretation of the clause "exceptional circumstances" given by the Department of Transportation has been able to change the situation substantially.

It is sufficient to note that out of 3,100 slots for domestic air carriers at four high-density airports, only forty-five are held by airline companies that begun to operate after deregulation.<sup>57</sup>

This anticompetitive situation<sup>58</sup> certainly does not provide the consumer with any advantages.<sup>59</sup>

Despite all this, many sectors continue to oppose the abolition of this rule. Environmentalists fear the elimination of slot restrictions will blast residents with noise. Small communities fear slot elimination will cause them to lose access to congested airports. Incumbent airlines, which have spent millions of dollars hoarding slots, and lending institutions, which have used slots as collateral for airline loans, object to their removal on economic grounds.<sup>60</sup>

In February 1999, the Department of Transportation ignored these objections and proposed the repeal of most of the rule concerning slot allocation to encourage the entry of new companies and increase competition.

On April 25, 2000, the Wendell H. Ford Aviation Investment Reform Act for the 21<sup>st</sup> Century (FAIR 21)<sup>61</sup> was promulgated.

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<sup>57</sup> Intervention at the Senate of Sen. John McCain, Oct. 29, 1997.

<sup>58</sup> In the case regarding the alliance between American Airlines and British Airways, before the Department of Transportation, the representative of the Department of Justice noted: "Moreover, where service in a market is constrained by slot availability, a hub carrier with access to a large pool of slots has even greater ability to respond to entry in [an anticompetitive] way because the entrant will be unable to add capacity on its own." *Hearings, supra* note 36, at 3.

<sup>59</sup> A study of the fares shows negative consequences of such monopolistic situations. This point can be illustrated by looking at the prices on certain routes. For example, from Atlanta to Dulles where there is competition between Delta Airlines and Air Tran, a return ticket costs \$188.50 whereas a return ticket between Atlanta and Washington National, where Air Tran cannot operate and only Delta can fly, costs \$1,008. *Id.* at 27.

<sup>60</sup> *Id.* at 4.

<sup>61</sup> The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (FAIR 21) constitutes a strong reform of American Civil Aviation. Pub. L. No. 106-181, 114 Stat 61 (2000). The aim of this law is to strengthen the whole aviation system and make the airport and the skies safer, while at the same time using airport taxes paid by passengers and operators in a better way and increasing competition between carriers. *Id.* Air traffic in the USA has increased in the last five years by 27 percent, reaching 655 million passengers in 1995. It is forecasted that this figure will increase to one billion passengers in the year 2010. With this positive data in mind, it cannot be ignored that airports are becoming

FAIR 21 introduces a gradual elimination of all restrictions linked to slots at La Guardia, Kennedy, and O'Hare airports. Such restrictions should be totally eliminated at O'Hare airport before July 1, 2002, while the deadline at the two New York airports is before January 1, 2007.<sup>62</sup>

The carriers that run a limited number of flights can, meanwhile, increase their operations by taking advantage of twenty slots each at New York airports and thirty slots each at Chicago O'Hare airport.

The Department of Transportation is authorized to allow slot exemptions for those carriers that intend to run a non-stop service using aircraft that have less than seventy-one seats on flight paths between La Guardia, Kennedy, and O'Hare and minor airports.<sup>63</sup>

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more and more congested, single carriers dominate the internal market, delays are on the upswing and fares are less and less linked to air miles covered.

In 1998, twenty-seven airports were seriously congested with over 20,000 hours of delay per year, which is the equivalent of 833 days lost per year by each of the twenty-seven airports due to aircraft delay. Moreover, nineteen out of the twenty most congested airports worldwide can be found in the United States. FAIR 21 hopes to get over this problems by (1) realizing an ATC system that is technologically advanced, thanks to the three-fold increase in funds assigned to the Air Traffic Control Facilities and Equipment Program (F & E) from 1 billion dollars per year to 3 billion dollars per year; (2) increasing to 5 billion dollars per year the fund for the Airport Improvement Program (AIP) in order to create new flight infrastructure (runways, taxiways, etc.); (3) progressively eliminating, as stated in the text, all the restrictions connected to the high density regulation; (4) obliging the hub airports, where there are dominant carriers that intend to apply for financial aid, to set down a plan showing how the airport intends to encourage and open up to new competitors; (5) establishing a program of investment to help small and medium size communities to obtain and promote better air services; (6) establishing a program of financial assistance to help small carriers buy regional jet aircraft if they use them to connect small airports that are not as yet serviced; and (7) increasing the fund to reduce noise pollution that affects people living around the airport. *Id.* As far as the use of taxes paid is concerned, in the preamble of the law it is observed that, since 1970 the passengers and the operators contributed to the Airport and Aviation Trust Fund, with the supposition that any taxes paid would later be used to improve services. *Id.* at pmbl. Unfortunately, this was not the case as only a small part of the money was invested in building infrastructures. If the situation does not change, the balance of the Airport and Aviation Trust Fund will increase by more than \$90 billion. To make sure that tax payers have a consistent return on taxes paid, the FAIR 21 rule states that the money coming from airfare taxes, fuel and other taxes are invested, as aforementioned, in order to achieve a safer and more efficient system of civil aviation. *Id.*; see also *Summary of FAIR 21, House Committee on Transportation and Infrastructure*, Mar. 4, 1999.

<sup>62</sup> 49 U.S.C. § 41715(a) (2001).

<sup>63</sup> See 49 U.S.C. § 41716(a) (2001) and 49 U.S.C. § 41717(b) (2001).

FAIR 21 also allows the Department of Transportation to permit Washington National airport to have twenty-four slot exemptions, twelve of which are concerned with links to airports up to 1,250 miles away and twelve for airports that are further away: as far as this airport is concerned, there is no provision for the eventual elimination of the slot rule.

In the meantime, the Department of Transportation should take the following into account when evaluating slot exemptions so as to favour public interest:

The benefits to the American economy, also in terms of job positions created and likewise consumer benefits following exemption;<sup>64</sup>

The availability of a more varied service that meets passenger needs, are more economical, more efficient and less expensive;

Avoid unreasonable industrial concentrations, dominant positions in the market, monopolies and other such conditions that make it easy for carriers to increase prices unreasonably and reduce services or cut out competition in air transport;

Encourage new air carriers or small carriers that are already on the market scene to go from strength to strength and increase in efficiency and at the same time ensure more competitiveness in the air transport industry.<sup>65</sup>

The first results of this new rule have been positive: new carriers have in fact been able to obtain access to La Guardia, Kennedy, and O'Hare airports. For example, the carrier and new entrant Midway Airlines has been able to obtain nine slots at La Guardia, in place of the slots that it previously rented from an incumbent carrier for \$1.88 million a year.

### 3. *Article 8.4 of the Regulation (CEE) No 95/93*

In the preamble of this study, we noted that there is a strong "hidden" slot market in Europe; that consists of trading, exchanges with monetary compensation, and purchases of companies, all with the unique aim of achieving slots.

The fact that these economic transactions take place in a "hidden" context is mainly due to the "cryptic" element of Article 8.4 of the 95/93 Regulation.<sup>66</sup> In fact, it is not clear and does not explicitly explain how slots should be given up, nor does it clar-

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<sup>64</sup> 49 U.S.C. § 41715(c)(1).

<sup>65</sup> 49 U.S.C. § 40101 (2001).

<sup>66</sup> European Commission, *Directorate General for Transport. Discussion Document, Revision of Council Regulation 95/93*, Apr. 10, 1996.

ify the relationship between the carrier that holds a slot and the slot itself.

Article 8.4 states that “ slots may be freely exchanged between air carriers or transferred by an air carrier from one route, or type of service, to another, by mutual agreement or as a result of a total or partial takeover or unilaterally.” Any such exchanges or transfers shall be transparent and subject to confirmation of feasibility by the co-ordinator that: a) airport operations would not be prejudiced; b) limitations imposed by a Member State according to Article 9 are respected; c) a change of use does not fall within the scope of Article 11, which includes safety measures to ensure that the transfer of slots does not hinder free competition or give advantage to certain carriers on particular air routes that enables them to block any possible new entrants.

Other important factors that can be found in the Regulation and that should be considered in this study are the following:

ARTICLE 8.5: Slot allocated to new entrants operating a service between two community airports may not be exchanged or transferred between air carriers or by an air carrier from one route to another as provided for in paragraph four for a period of two seasons.

ARTICLE 8(1)(A): An airline, which has used a slot in one traffic season, is entitled to claim it in the next equivalent season.

ARTICLE 10(1) AND (7): Newly created slots, unused slots and slots which have been given up by a carrier during, or by the end of, the season or which otherwise become available are to be placed in a slot pool and distributed among applicants, with new entrants having priority over fifty percent of them.

ARTICLE 10(2): Any slots not utilized shall be withdrawn and placed in the slot pool unless non-utilization is due to exceptional circumstances.

ARTICLE 10(3)-(5): “Grandfather rights” shall not apply unless the carrier can show that the slots have been used by that air carrier for at least 80 percent of the time during the period for which they have been allocated, except where it takes place due to specified exceptional circumstances, and in such event the slot shall be placed in the slot pool.

The slots can therefore be “freely exchanged among air carriers.”

The exchange can take place on the basis of “mutual agreement” or following “total or partial takeover:” this second hypothesis obviously takes into consideration those cases when a

carrier purchases all or part of another carrier's shares and/or all or part of its operations.<sup>67</sup>

The third hypothesis considers the case in which an exchange takes place "unilaterally:" the use of this term is clearly inappropriate and as such should not be taken into consideration.

Anyway, it is not clear how mutual an exchange should be. In other words, it is doubtful whether a carrier could exchange a group of slots for one slot only, or whether the exchange should follow the one for one rule.

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<sup>67</sup> John Balfour, *Slots for Sale*, 22 AIR & SPACE LAW 109, 111 (1997). The doctrine looked into the question of whether regulatory authorities (both national and community authorities) are entitled to require the carriers to give up their slots to other carriers in exchange for approval of an alliance or merger. In fact, before Regulation 95/93 was introduced, it was common practice for the European Commission to impose such conditions (This can be seen in the case of British Airways/British Caledonian, 1983; and again in the case of Air France/UTA 1990; Air France/Sabena, 1992 and also British Airways / TAT, 1992.). Once the Regulation 95/93 came into force the Commission was able to reaffirm its position.

In July 1995, the Commission approved that Swiss Air could purchase 49.5 percent of Sabena share capital, establishing certain basic undertakings for both parties. These included, inter alia, the commitments of Sabena to make a maximum eighteen slots per day to and from Brussels airport available to benefit any carrier that wanted to start up or improve links on certain routes between Brussels and Switzerland, and that had not been able to obtain slots needed via normal procedures. In January 1996, the Commission granted exemption under former Article 85.3 (now known as Article 81.3 following renumbering of the Treaty of Amsterdam) in respect of the alliance between Lufthansa and SAS. The exemption was based on a series of conditions of which, one in particular, related to the fact that the two carriers must make certain slots available, under certain conditions, to the carrier that requests the slot, whenever a community carrier wants to set up or improve links on eight specific routes between Germany and Scandinavia, and cannot otherwise obtain these slots through normal procedures. The doctrine shows some perplexity on whether these conditions can be imposed or not. Article 10 of the Regulation 95/93 states clearly that slots not being used (including those that have been given back) must be placed in the slot pool and therefore it does not seem possible to place them elsewhere or give them up to a third party established by an authority or by the Commission. Council Regulation 95/93, 1993 O.J. (L 140) 1, at art. 10. If it is true, as stated in the 15th whereas of Regulation 95/93, that a rule cannot fail to observe the fundamental norms of a Treaty, including the ones that deal with competition, this does not mean that the Commission can derogate a regulation granting exemption under Article 81.3. Article 81.3 states that Article 83.1 can be declared not applicable in certain cases, but it does not seem very plausible that such discretion can be applied when it allows exemptions based on conditions that are incompatible with other community rules. *Id.* art. 81.3. On the other hand, it would be more acceptable should the Commission ask a carrier to exchange slots with another carrier or with any new competitor that wants to run a service on a particular route, on condition that the latter has or can obtain a sufficient number of slots to complete the exchange.

In contrast to the “exchange,” is the so-called “transfer” that is permitted only when a carrier wants to use one of his slots for a different route or for a different type of service.

The transfer of a slot from one carrier to another is seemingly not permitted by the Regulation: in fact, this would mean that a slot is not being used by the carrier who is prepared to give it up and so such a slot should be withdrawn and inserted into the pool.<sup>68</sup> Likewise, the Regulation does not allow for a slot to be simply given up for a fee without any kind of slot exchange.<sup>69</sup>

Moreover, the prevalent point of view in the doctrine<sup>70</sup> is that an exchange of slots together with an economic compensation is acceptable.

An English court recently reached a decision on this point, holding that “where slots are exchanged, the fact that there is an accompanying money payment by the acquirer of what are perceived to be the more valuable slots does not convert the exchange into a sale and does not take the transaction out of the scope of an exchange.”<sup>71</sup>

Moreover, the court did not pronounce sentence on an alternative argument advanced by the defendant (the slot Coordinator at Heathrow airport) who claimed that even if he had to admit that the transaction was a “transfer” and not simply an exchange it was anyway permitted in the light of Article 8.4.

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<sup>68</sup> Balfour, *supra* note 67, at 110.

<sup>69</sup> The former European Commissioner of Transport, N. Kinnock, observed that “the Regulation did not provide for any kind of sale of the slots but only for an exchange of them as can be seen in Art. 8(4).” O.J. No. L. 141.22.1.93.

<sup>70</sup> Balfour, *supra* note 67, at 111; Girardi & Colletta, *supra* note 1, at 99; Silin-gardi & Maffeo, *supra* note 1, at 35; Dario Maffeo, *Sull'ammissibilit  di contratti di compravendita di slots*, in DIR. DEI TRASP. 668 (1999).

<sup>71</sup> *Regina v. Airport Co-ordination Limited ex parte of The State of Guernsey Transport Board, Queen's Bench Division (Swansea Crown Court) March 25, 1999*, DIR. DEI TRASP. 665 (1999). The fact that led to this statement came from certain decisions taken by a slot coordinator at Heathrow (Airport Co-ordination Limited - ACL) that approved an agreement reached between British Airways (BA) and Air UK Limited (Air UK), a sub-company of KLM, dealing with some slot exchanges. The peculiarity of this case was that although the same number of slots were exchanged, their value was by no means equal. The slots transferred from BA to Air UK where in fact those that Air UK did not intend to use and were in any case about to be placed in the slot pool. On the other hand, the slots given to British Airways by Air UK had a high commercial value. In fact, BA paid additional money to Air UK along with the exchange. The Board of Guernsey that is responsible for all questions linked to transport to and from this place claimed that this kind of transfer operation and sale was illegal, made to look like a legal exchange according to Article 8.4 of Reg. EEC January 18, 1993 No. 95/93. The Board therefore summoned the slot coordinator at Heathrow.



The judge, in view of his primary findings, concluded that he did not need to reach decision on this point. The judge expressed relief that he did not have to do so because of the curious drafting of this part of Article 8.4. He added that he would "content" [him]self with the observation that the "transfer" provision is something of a drafting curiosity, bearing the hallmark of the old joke about the definition of a camel [i.e. a horse designed by a committee].

It should, however, be noted that this interpretation of Article 8.4 (the only one possible according to us) authorizes the trading of slots. In fact, this trade constitutes a normal market procedure of exchanging slots with the ambiguous inclusion of money dealings and the only restriction posed is that another slot (even if it is valueless!) is part of the deal.<sup>72</sup>

On the other hand, the term "grandfather rights," used in the English language version of Regulation (EEC) No. 95/93, was more than likely translated badly in the Italian text as "diritti acquisiti" (i.e. rights acquired): the former simply means that there is a historical precedence in using the slot, and it does not give the carrier any exclusive right on the slot.<sup>73</sup>

The fact that it is impossible to talk about property rights of carriers over slots is made even more clear considering the fact that a slot, from a technical point of view, is only a space in time that can be used by aircraft to take off and land. With this definition in mind, the German doctrine argues that time, in a certain place, is a something that belongs to the public, and goes on to say that owners of slots only have equal rights in using limited air space "gleichberechtigte Teilhabe am begrenzten Gut Luftraum," and they cannot dispose any free choice over this.<sup>74</sup>

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<sup>72</sup> Maffeo, *supra*, note 70, at 671.

<sup>73</sup> Bellan, *supra* note 1, at 75. In his presentation at the Strategy for Overcoming Slots Limitation, John Balfour noted that questions related to ownership of a slot are irrelevant because even if a party held a slot in the past it can not automatically have it back or trade it in any way except when an airline company that uses the slot is able to meet the 80 percent rule (a rule that is naturally very seldom, if ever, achieved by carriers. See Balfour, *supra* note 8, at 4. However, even if the 80 percent rule were met, the Regulation itself would be able to decide the destiny of the unused part of the slot. *Id.*

<sup>74</sup> See E. Giemulla & R. Schmid, *Wem gehört die Zeit?*, Z.L.W. 51 (1992), and *Nochmals - Wem gehört die Zeit?*, Z.L.W. 259 (1991). On the question regarding the ownership of time, it would be interesting to note that during the Middle Ages, renting with interest was condemned because it was not possible to sell time that is common to all creatures: "Queritur an mercatores possint licite plus recipere

#### 4. Amendments

In the first draft of the reform of Regulation 95/93, there are two main kinds of amendment of the original text. In fact, one part aims at defining some of the measures mentioned in the paper, without changing them radically. A second part includes more revolutionary proposals that would completely change the Regulation, if ever adopted.

As far as the first part is concerned, it includes a series of hypotheses that aim to modify the role of the co-ordinators in order to make them more independent and make their position more like that of a third party in the slot allocation procedure. However, in this position, the co-ordinator would play a major role, integrating and co-ordinating more with bodies such as those that control air traffic and those managing the airport.<sup>75</sup>

A further series of modifications in the reform aims at clarifying those aspects of the Regulation that have produced varied, conflicting interpretations in different Member States. For example, the subdivision of community airport in two categories, namely co-ordinated and fully co-ordinated, has been abolished: if these proposals of modification were adopted, community airports could be divided into two groups known as co-ordinated airports (schedules facilitated airports where, in order to land or take off, during the periods for which it is coordinated, it is necessary for an air carrier to have been allocated a slot by a coordi-

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de eadem mercatione ab illo qui non possit statim solvere quam ab illo qui statim solvit. Arguitur quod non, quia *tunc venderet tempus* et sic usuram committeret *vendens non suum*." Le Goff, *Tempo della Chiesa e Tempo del Mercante*, TURIN 3 (1977).

<sup>75</sup> See Draft proposal for a European Parliament and Council Regulation Amending Council Regulation (EEC) No 95/93 of January 18, 1993, on Common Rules for the Allocation of Slots at Community Airports, Brussels, May 25, 2000, at art. 1, § 4(b): The Member State responsible for a schedules facilitated or coordinated airport shall ensure the appointment of a qualified natural or legal person as schedules facilitator or airport coordinator respectively after having consulted the air carriers using the airport regularly, their representative organizations and the managing body of the airport. The same schedules facilitator or coordinator may be appointed for more than one airport. Article 1, § 4(c):

A Member State shall ensure that at a schedules facilitated airport, the schedules facilitator carries out his duties under the Regulation in an independent manner. A Member State shall ensure that at a coordinated airport the coordinator is institutionally separated and de facto independent from any single interested party. The Member State shall ensure that the coordinator carries out his duties impartially according to this Regulation and that sufficient resources are made available in such a way that the financing of the coordination activities does not affect his independence.

nator) and schedule-assisted airports (airports where there is potential for congestion at some period of the day or week that is likely to be resolved by voluntary cooperation between airlines and where a schedules facilitator has been appointed to facilitate the operations of air carriers operating or intending to operate that airport).<sup>76</sup> Likewise, the definition of 'new entrant' has been modified. On the one hand, it now includes carriers with a more substantial presence at the airport in question, but on the other hand, it explicitly excludes established carriers benefiting from new entrant status through joint operations or other arrangements.<sup>77</sup>

Turning now to those amendments proposed that would radically change the Regulation 95/93, should they ever be accepted, the first to note introduces a clear explanation of the carrier rights over a slot, following slot allocation. This draft of reform clearly explains that slots are granted, rather than given,

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<sup>76</sup> See *id.* at art. 1, § 2(c) and (d).

<sup>77</sup> See *id.* at art. 1, § 2(b) stating:

New entrant' shall mean (i) an air carrier requesting, as part of a series of slots, a slot at an airport on any day, where, if the carrier's request were accepted, it would in total hold fewer than five slots at that airport on that day, or (ii) an air carrier requesting a slot for a non-stop scheduled service between two Community airports where at most two other air carriers operate a direct scheduled service between these airports or airport systems on that day, where, if the carrier's request were accepted, it would nonetheless hold fewer than five slots at that airport on that day for that non-stop service; (iii) an air carrier requesting a slot at an airport for a non-stop scheduled service between that airport and a regional airport where no other air carrier operates a direct scheduled service between these airports or airport systems on that day, where, if the carrier's request were accepted, it would nonetheless hold fewer than five slots at that airport on that day for that non-stop service. For the purpose of paragraph (i), an air carrier shall not be considered as a new entrant if at the time of allocation: it has, at the airport concerned, a joint operation, code sharing or franchise arrangement with another air carrier which itself is not considered as a new entrant, or the majority of its capital is held by another air carrier which itself is not considered as a new entrant (subsidiary company), or it holds directly or indirectly the majority of the capital of another air carrier which itself is not considered as a new entrant (parent company), or it forms part of a group of undertakings, including air carriers of which one is not considered as a new entrant. For the purpose of paragraph (ii), an air carrier which alone or together with other partners in a group of airlines holding more than 7 percent of the total number of slots on the day in question at a particular airport, or airport system shall not be considered as a new entrant at that airport on that day.

during slot allocation. As said in the Explanatory Memorandum of the Draft Proposal:

The slot allocation system, should be considered as a 'concession' system where the slots are allocated to the most deserving air carrier. In fact, the Commission has had this in mind when deciding on the present proposals. Slots do not constitute property rights but only entitle air carriers to access the airport facilities by landing and taking off at specific dates and timings. All slots are subject to that system, which foresees that slot allocation, i.e. the allocation of the right to land and to take off at an airport, takes place on the basis of a time limitation.<sup>78</sup>

In fact, the paper proposes the temporary nature of the granted rights and states that they should be destined to expire after a period of ten equivalent scheduling periods from the date of allocation.<sup>79</sup>

If this principle were accepted, it would mean the total abolition of the "grandfather rights" and also of any pre-existing rights held over slots by incumbent carriers. Established slot rights would transform and therefore, automatically become temporary in nature following the new Regulation. Such a reform would represent an excessive blow to carriers and with this in mind, a mitigation of the proposed reform has been introduced. The review suggests that those who already hold slots and "grandfather rights" can go on doing so without time limits until the slot is transferred or given up to another carrier or placed into the slot pool.<sup>80</sup>

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<sup>78</sup> *Id.* at *Explanatory Memorandum*, § 6.

<sup>79</sup> *See id.* at art. 8, § 1(a): "Slots are allocated on the basis of a concession at the expiry of which they have to be returned to the slot pool as set up according to the provisions of Article 10." *See also Draft Proposal, supra* note 75, at art. 10, § 1: "All pool slots, except for those referred to in Article 8 (5), will be allocated to applicant carriers for a period of ten equivalent scheduling periods. At the end of ten equivalent scheduling periods, irrespective of any intervening transfers and/or exchanges, the original allocated slot shall be placed back in the pool."

<sup>80</sup> *See id.* at *Explanatory Memorandum*, § 7 stating:

The general framework for initial slot allocation in the draft Regulation (Article 8(1)) reconfirms the principle of so-called 'grandfather rights.' This reconfirmation of a certain historic precedence in the usage of slots is justified to the extent that the passengers will benefit from a certain stability and continuity of services. This principle is also of critical importance for the operators, which need the guarantee that the networks they are developing will not be unduly affected by forced and unpredictable reallocations of slots. For these reasons, and because any change in the priority of the historical preference would have serious repercussions internationally, ex-

Another point to be noted concerning "grandfather rights" is that the draft of reform proposal establishes that only a group of slots can be "grandfathered" and not single slots.<sup>81</sup>

The most interesting and innovative modification proposed in the draft version of the Regulation deals with the mobility of slots, that is the introduction of a system that allows slots to be transferred from one carrier to another after slot allocation has been granted that functions alongside the normal slot allocation procedures.

In order to better understand the impact of the amendments now under discussion, it is worth remembering certain cryptic points set down in Article 8.4 of the Regulation that have caused difficulty and led to varied and conflicting interpretations. According to the Regulation slots can be:

freely exchanged among air carriers;

transferred by a carrier from one route to another or from one service to another;

exchanged, following total or partial purchase.

In fact, as already seen, in the original version of Article 8.4, it is difficult to understand what "transfer" of a slot means exactly. The proposed amendments attempt to clarify this term using it to refer to all hypothesis of change of ownership of slot rights, changes that do not represent any kind of exchange (i.e. sales, leasing, donation, take over of slots following the partial or total purchase of a carrier).

The amendments affect the original rule in two ways.

First, they confirm that the system of circulation of slots as originally provided for in the Regulation is legitimate, but they

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perts from the member States and from the industry have always opposed any direct limitation of 'grandfather rights.

<sup>81</sup> The principle of 'grandfather rights' is expressed in the *Draft Proposal* at Article 8, § 1(b) as follows:

Notwithstanding paragraph 1 of this Article and subject to the provisions of Articles 7, 8a, 9, 10 and 14, a slot that has been operated by an air carrier as part of a series of slots cleared by the coordinator shall entitle that air carrier to claim the same slot at the same time as part of a series of slots in the next equivalent scheduling period. Member States may limit such entitlement to series of slots operated with a minimum aircraft size. Such entitlement shall not give rise to any claims for compensation in respect of any limitation, restriction or elimination thereof imposed under Community law.

*Id.* at art. 8, § 1(b).

introduce a few corrections and specifications:<sup>82</sup> slot exchanges continue to be permitted, but with the novelty that exchanges can only be made on a one-to-one basis and that such an exchange is legitimate if both the carriers involved undertake to use the slots exchanged.

Second, carriers can also continue to transfer their slots from one route to another and from one type of service to another.

However, new entrants can only take advantage of this provision once they have held a slot for at least three equivalent seasons, having obtained it through a co-ordinator.<sup>83</sup> Another novelty is that slots can be transferred between parent and subsidiary companies.

As for the acquisition of slots in case of (total or partial) take-over, the amendments aim at clarifying that it constitutes a transfer rather than an exchange, with the specification that such a transfer is valid only when the slots transferred are directly related to the business taken over.

Looking at the amendments from a different point of view that is more interesting for our study, it can be seen that the amendments, presently under discussion, introduce into the Regulation the right for carriers to transfer slots, even for a fee. This enables carriers to sell, buy, and rent slots. In the Commission's opinion,

[t]he introduction of market mechanism as a way to facilitate slot movements will contribute considerably to the flexibility at highly congested airports. One of the main disadvantages of Regulation 95/93 has been that carriers have had no incentive to make efficient use of their slot portfolio. Today, rather than returning superfluous slots to the pool, carriers continue to use the slots in order to ensure that they have sufficient slots when they need them. This obviously leads to inefficiencies and reduces access

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<sup>82</sup> See *id.* at art. 8a, § 1 stating:

Slots may be: (a) transferred by an air carrier from one route or type of service to another route or type of service operated by that same air carrier; (b) transferred (i) between parent and subsidiary companies, (ii) as part of the acquisition of the majority of the capital of an air carrier, or (iii) in the case of a total or partial take-over when the slots are directly related to the business taken over; (c) exchanged, one for one, between two air carriers where both air carriers involved undertake to use the slots received in the exchange.

<sup>83</sup> See *id.* at art. 8a, § 5(b). Article 8a, § 5(b) states: "Slots allocated to a new entrant as defined in Article 2 (b) (ii) and (iii) may not be transferred to another route as provided for in paragraph 1 for a period of three equivalent scheduling periods."

for new entrants. By allowing air carriers to buy and sell, a market of slots can develop that allows carriers to adapt their slot portfolio to their real needs.<sup>84</sup>

It is more than likely that in the light of problems faced in the U.S. following the Buy-Sell Rule, the modification of the Regulation also considers the introduction of numerous limitations, restrictions and protective measures dealing with allocation of the right to transfer slots. These can be summed up as follows:

Slots "can be transferred between air carriers . . . with or without monetary compensation;"<sup>85</sup>

"no carrier shall be able, by effecting such transfers, to increase its total number of slots per scheduling period at that airport by more than 5 percent of the total number of slots available for allocation as determined in accordance with Article 6;"<sup>86</sup>

"Such transfers shall not take place during scheduling conferences;"<sup>87</sup>

"At the end of ten equivalent scheduling periods, irrespective of any intervening transfers and/or exchanges, the originally transferred slot . . . shall be placed in the pool referred to in Article 10;"<sup>88</sup>

Transfers must take place in a transparent and non-discriminatory way. All carriers should be allowed to participate in the transfer: "[a]ny interested air carrier shall be given the opportunity to take note of such a transfer before it is implemented. To this end, intended transfers shall be communicated to the coordinator prior to their implementation, and the coordinator shall keep a freely accessible register of intended slot transfers;"<sup>89</sup>

"At the request of one or more air carriers interested in the transfer . . . the co-ordinator shall organise at the airport concerned an auction meeting open to all interested carriers" to ensure that they are allocated to the highest bidder. The auction "shall be conducted in a transparent, neutral and non-discriminatory manner. The co-ordinator may limit the number of auction meetings to no more than two by scheduling period;"<sup>90</sup>

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<sup>84</sup> See *Draft Proposal, supra* 75, at *Explanatory Memorandum*, § 11.

<sup>85</sup> See *id.* at art. 8a, § 2(a).

<sup>86</sup> See *id.*

<sup>87</sup> See *id.*

<sup>88</sup> See *id.* § 2(b).

<sup>89</sup> See *Draft Proposal, supra* note 75, at art. 8a, § 2(c).

<sup>90</sup> See *id.* § 3.

"Slots allocated to a new entrant . . . may not be transferred to another air carrier . . . for a period of three equivalent scheduling periods."<sup>91</sup>

Both exchanges and transfers continue to be subject to the co-ordinator's confirmation, who must, in addition to the requirements set down in Article 8.4, verify that:

Transfers do not concern slots that have been allocated to new entrants and that have not yet been in vigour for three equivalent scheduling periods since the first allocation date;

In the case of transfers, which take place accompanied by monetary compensation, "no other carrier is willing to pay more for the right to be transferred;"<sup>92</sup>

"In the case of exchanges between two air carriers . . ., both carriers intend to operate the slots resulting from the exchange or from the subsequent exchanges;"<sup>93</sup>

It is interesting to note three more provisions in the draft proposal of the Regulation, which, for different reasons, deserves special attention.

According to the first of these provisions, leasing of slots shall be considered and treated in the same way as transfers.<sup>94</sup> To be more specific, when slots are leased, it is necessary to apply the same restrictions regarding the possibility for a carrier to increase, following transfer, the number of slots held by more than five percent of the total of slots available. Furthermore, once a slot has been leased, the period of rental must be calculated in the ten-year period after which the slot must be placed back into the slot pool. Lastly, the renting of the slots should be made public, communicated to the co-ordinator, and included by the co-ordinator into a public register.

This provision does not explicitly mention whether, in the case of renting a slot, the request to use the slot for at least eighty percent of the time in order to keep it, must be applied. However, it appears that the similarity in treating renting and transfers would mean that this rule does apply. The requirement can be met by simply demonstrating that slots are actually used by the renting carrier, during the period of leasing.

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<sup>91</sup> See *id.* § 5(a).

<sup>92</sup> See *id.* § 4(d).

<sup>93</sup> See *id.* § 4(e).

<sup>94</sup> See *Draft Proposal*, *supra* note 75, at art. 8a, § 2(a). Article 8a, § 2(a) states: "Leasing of slots shall be considered as transfers within the meaning of this paragraph."



The second provision that deserves special attention and should be quoted is the one that deals with the ownership of slots when connections are provided by two joint carriers<sup>95</sup> (for example following code-sharing agreements, franchising or other similar set-ups). In this case, a norm is introduced, in order to ensure that:

Only one of the participating air carriers can apply for the required slot;

Slots allocated to one air carrier in the operation may be used by (an) other participating air carrier(s) for their shared operations, provided that the designator code of the air carrier to whom the slots were allocated remains on the shared flight for coordination and monitoring purposes;

Upon discontinuation of such operations, the slots so used remain with the party to whom the slots were originally allocated.

The third provision of particular interest is the one that deals with the possibility of a co-ordinator to withdraw slots whenever all measures set down in the Regulation have been exhausted, and there are no other means of acquiring at least five percent of slots allocated in order to grant them to new entrants.<sup>96</sup> This

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<sup>95</sup> See *id.* at art. 8a, § 6 stating:

In the case of joint operations, code-sharing and franchise between air carriers, only one of the participating air carriers can apply for the required slots. The air carrier operating such a service assumes responsibility for meeting the operating criteria required to maintain historical precedence. Slots allocated to one air carrier in the operation may be used by (an) other participating air carrier(s) for their shared operation, provided that the designator code of the air carrier to whom the slots were allocated remains on the shared flight for coordination and monitoring purposes. Upon discontinuation of such operations, the slots so used will remain with the air carrier to whom they were initially allocated. Air carriers involved in shared operations shall advise coordinators of the detail of such operations.

<sup>96</sup> See *id.* at art.10, § 8 stating:

If, less than 5 percent of the total number of slots available for allocation at a given airport have been allocated to new entrants and if outstanding requests exist from new entrants, the member State shall ensure that a meeting of the airport coordination committee is convened. The purpose of the meeting shall be to examine possibilities for improving the situation including reclaiming of slots and ensuring that at least 5 percent of the total number of slots will be allocated to new entrants for the next equivalent scheduling period. The Commission shall be invited to such a meeting. The coordinator shall implement measures proposed by the coordination committee to remedy the situation, provided that such measures

means that an incumbent community carrier could be asked to give up some of its slots, in no uncertain terms, without discrimination and on a proportional basis, in order to ensure that five percent of the total slots are available for distribution among new entrants in the upcoming season. The justification for this provision is given by the Commission in the Explanatory Memorandum:

However, when the level of saturation at an airport is such that new entry through the normal procedure is not possible, contingency measures are required as a last resort solution. The Commission considers it necessary to introduce the possibility of withdrawal of slots when the other provisions of the Regulation have failed to ensure that a minimum number of slots are allocated to new entrants.<sup>97</sup>

### 5. *Final considerations*

After fifteen years since the high-density rule was first introduced, it has failed. Through the Regulation, larger incumbent carriers have been able to hoard a good part of the market and make it difficult for new entrants to enter, thus forcing consumers to pay high fares that do not correspond to the service offered.

Furthermore, the Buy-Sell Rule has allowed the larger carriers to sell public resources—that were given freely at the beginning—for hundreds of millions of dollars without any economic returns to the taxpayers.

The fact that these rules have allowed such carriers to avoid having to give up their slots and has allowed them to lease slots out to other companies or affiliate commuters, has led to a non-optimal use of the precious resource of airport capacity.

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respect Community law. If the coordination committee is unable to remedy the situation otherwise, the coordinator shall, upon approval of the Member State responsible for that airport, reclaim from Community air carriers series of slots on a transparent, non-discriminatory and proportionate basis, to be evenly distributed over the coordinated period(s) as defined in paragraph 5 (a) of this Article, so that for the scheduling period in question 5 percent of the total number of slots will be available for redistribution. The coordinator shall allocate these reclaimed slots to new entrants as defined in Article 2 (b). The coordinator shall make available upon request all relevant documents, notably those concerning the methodology used for the reclaim and the redistribution of the slots, to interested parties.

<sup>97</sup> See *id.* at *Explanatory Memorandum*, § 8.

The United States Government faced this problem by opting to abolish—albeit progressively—both the high-density rules and the norms dealing with the trading of slots.

Meanwhile in Europe, despite the provisions set down in Article 8.4 that does not allow for the trading of slots, a “hidden market” was established bringing with it negative side effects for competition.

However, as already noted, slots are rare goods and carriers are prepared to pay high sums of money for them. In addition, a flight link with good slots is guaranteed to provide high chances of success and could represent a strong barrier, keeping out competition.

In such a situation, it is wrong not to regulate the issue, trusting in a free market. On the other hand, it is wrong to impose absolute prohibitions that would inevitably create elusion difficult to control.

In both cases, slots would continue to be traded but without any guarantees of transparency and without taking into consideration the interests of the consumer-user.

For these reasons it must be agreed that the measures proposed by the modification of Article 8.4 of Regulation 95/93, recognizing the possibility of trading slots, are easily acceptable.

It could be argued that the measures taken in the United States led to unwanted effects of strengthening the position of certain undeserving carriers that already controlled the market and hindered new potential competitors. On the other hand, many of the provisions set down to amend to slot transfer rules make it clear that certain risks can be avoided.

Without a doubt, the intention to define carrier rights when slots are allocated in a non-ambiguous way can only be appreciated. The introduction of the concept to grant slots is appropriate. In this way, the idea that a slot was in any way an object to be owned, even in a restricted and conditioned way, has been pushed aside. With this subject in mind, we have already noted that goods of certain category, like time, cannot belong to any single body, but by definition must belong to the general public and denied to individuals.

It is more difficult to accept other aspects set down in the reform. The careful position taken in dealing with “grandfather rights” can only dissatisfy. As aforementioned, the adoption of the proposed amendments to the regulation, regarding a slot as something that is granted rather than owned, would mean the

eventual abolition of “grandfather rights.” If this does not happen, and “grandfather rights” continue to exist, it cannot be denied that these represent an obstacle in reaching the main objectives of the reform. The rights to have priority in slot allocation, favouring *ad aeternum* those whom already hold slots certainly does not reconcile with the need to guarantee competition among carriers, even if it is efficient and plausible. The statement that, due to the abolition of the “grandfather rights,” incumbent carriers would be harmed since they had already invested a lot on the connections they already operate, seems to be a pretext, and fails to sustain those who want to keep the “grandfather rights.” It is difficult to understand why a new entrant has to be able to cover the costs of investment made within a ten-year period and yet an incumbent carrier (who has probably already been using the slot for a long time) considers the same period to be a kind of penalty. Even if this is the case, a transitory period allowed in the reform should be sufficient to moderate any eventual negative effects, as the withdrawal of slots at each slot expiry date would be gradual.

The rule regarding the renting of slots seems to be too concise.

It would be opportune to use transfer rules as a point of reference and thus making the rules on renting slots more explicit in order to avoid conflicting interpretations. Other aspects of the rule need to be rewritten. To be more specific, we are referring to the need to sanction the eighty percent period necessary to keep hold of a slot even in the case of renting. The aim of this norm restriction is to avoid any eventual risk that the renting of a slot could become an easy system for temporary storing of unused slots and a way of stopping their withdrawal, as occurred in the United States.

Finally, we want to highlight a point that needs considerable attention in order to improve the Regulation 95/93, which seems to have remained unaltered even after the amendments.

We are referring to the scarce, if nonexistent, part played by airport managing bodies in slot allocation procedures.

This non-existence is particularly strange if you consider that a slot is a carrier’s right to use the infrastructure and services of an airport for a certain period of time whenever it lands or takes off.<sup>98</sup>

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<sup>98</sup> For explanation of the slot concept, see Silingardi & Maffeo, *supra* note 1, at 12.

A slot is therefore linked to the capacity of airport infrastructures and the company that runs the airport has the task of continuously increasing it, at its own expense.<sup>99</sup>

The airport managing body that builds, maintains, and extends its infrastructures is strongly linked to the slot and therefore, should be able to participate and have a more important role in slot allocation and slot transfer procedures.

We particularly believe in a system and procedure that allow airport managing bodies to express their point of view and even oppose certain transfers and allocation of slots that harm or hinder the development of air links that are considered to be vital for both consumers and for the community served by the airport.<sup>100</sup>

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<sup>99</sup> Refer to the text of art. 3 of Reg. (EEC) No. 95/93.

<sup>100</sup> For the safeguard of the interests of the Local Communities in the United States of America, see observations, *supra* notes 24 & 25.